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Nos. 85-792 and 85-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION and
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL RAILWAY LABOR CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONS

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INTEREST OF *AMICI CURIAE*

The Association of American Railroads is the trade association for the nation's railroads. Its members employ approximately 94% of the workers, operate approximately 92% of the trackage, and account for approximately 97% of the freight revenues of all railroads in the United States. The Association represents its member railroads before courts, agencies, and the U.S. Congress when matters of common concern are at issue.

Almost all of the nation's Class I railroads are members of the National Railway Labor Conference. The Conference represents member railroads both in national collective bargaining pursuant to the Railway Labor Act with unions representing their employees and in regard to other labor-management relations problems that are of concern to the railroads generally. In addition, the Conference serves as a clearing house of information regarding, and renders assistance and advice to member railroads concerning, employee protection issues that arise out of mergers and other railroad transactions governed by the Interstate Commerce Act.

This case raises the question whether disputes arising out of rail carrier efforts to implement transactions approved by the Interstate Commerce Commission are to be resolved according to the procedures prescribed by the Interstate Commerce Act, or the procedures prescribed by the Railway Labor Act. The difference between the two Acts on this score is critical. Under the Interstate Commerce Act such disputes are resolved promptly by mandatory, binding arbitration; under the Railway Labor Act they may lead to strikes and other forms of self-help, interfering with interstate commerce and possibly blocking altogether the realization of transactions held to be in the public interest.

The decision of the court of appeals in this case misconstrues the relationship between the two statutes and threatens serious interference with and delay to the ability of railroads to implement not only Commission-approved trackage rights transactions, which is the subject of this case, but also mergers and consolidations that have already been approved or may in the future be approved. As we show below, there is no more important labor relations issue in the railroad industry today than the one involved in this case. The AAR and the NRLC accordingly file this brief in support of a grant of cer-

tiorari.[1] We understand that the unions involved herein, the United Transportation Union and the Brotherhood of Locomotive Engineers, will also seek certiorari, and that one or both of them has been authorized to state that the Railway Labor Executives' Association, which consists of the presidents of all of the major rail unions, supports their efforts in that regard. In short, the industry is united in seeking review so that this Court may determine the proper relationship between the Interstate Commerce Act and the Railway Labor Act in disputes over the implementation of ICC-approved transactions.

STATEMENT

1. The Statutory Framework.

a. The Interstate Commerce Act requires the approval of the Commission before rail carriers can take certain actions or engage in certain transactions, such as rail abandonments (49 U.S.C. § 10903), mergers and consolidations, and acquisitions of trackage rights over another carrier's line. § 11343. With respect to transactions subject to § 11343, the Commission's jurisdiction is "exclusive," and carriers participating in approved transactions are "exempt * * * from all other laws * * * as necessary to let that person carry out the transaction * * *." § 11341(a). In determining whether to grant an application subject to § 11343, the Commission is required to consider, among other things, "the interest of carrier employees affected by the proposed transaction," § 11344(b)(1)(D), and if it approves the application the Commission "shall require the carrier to provide a fair arrangement" to protect employees adversely affected by the transaction. § 11347.

In a series of decisions, the Commission has established the protections to be afforded employees adversely af-

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[1] Written consents from all parties to the filing of this brief have been filed with the Clerk of the Court.

fected as a result of approved rail abandonments,[2] mergers and consolidations and common control transactions,[3] and lease and trackage rights transactions.[4] Under these decisions, an employee who is dismissed from his job or displaced to a lower paying position as a result of the approved transaction will continue to receive, generally for six years, the equivalent of the wage he was earning at the time of the adverse effect; employees must accept available work in order to preserve their protected status; moving expenses are provided if relocation is necessary; transfers of work are subject to "implementing agreement" provisions regarding the allocation of seniority or other rights of affected employees; and arbitration of disputes arising out of carrier efforts to implement approved transactions is mandatory if the carrier and the union representing affected employees do not voluntarily enter into an implementing agreement. See *New York Dock Ry.* v. *United States*, *supra*, 609 F.2d at 94.

b. Efforts to change collective bargaining agreements in the railroad (and airline) industry give rise to so-called "major disputes" under the Railway Labor Act. *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 723 (1945). Because the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes,'" *Texas and New Orleans R.R.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, 565 (1930), the Act requires the parties to such a dispute to follow certain prescribed procedures designed to maximize the possibility of reaching agreement. Those procedures are "purposely long and drawn

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[2] *Oregon Short Line R.R.—Abandonment—Goshen*, 360 I.C.C. 91, 98-102 (1979).

[3] *New York Dock Ry.—Control—Brooklyn Eastern District*, 360 I.C.C. 60, 84-90 (1979), *enforced*, *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

[4] *Norfolk and Western Ry.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 I.C.C. 653 (1980).

out," *Railway Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 246 (1966), and their exhaustion is "almost an interminable process." *Detroit and Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142, 149 (1969).[5] At their ultimate conclusion, however, the parties may resort to self-help, including a strike by a union if its demands have not been met. *E.g.*, *Railway Clerks* v. *Florida East Coast Ry.*, *supra*, 384 U.S. at 243-44.

2. The Decisions Below.

In the proceeding below, in order to ameliorate the anticompetitive effect of the merger of the Union Pacific ("UP") and Missouri Pacific ("MP") railroads, the Commission granted two competing carriers—the Missouri-Kansas-Texas ("MKT") and the Denver and Rio Grande Western ("DRGW")—rights to operate their trains over tracks owned by MP. The trackage rights applications submitted to and approved by the Commission stated that the MKT would use its own employees to man its trains, and that the DRGW would have the

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[5] In *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969), this Court described the Act's "detailed framework to facilitate the voluntary settlement of major disputes":

> "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10."

option of doing so. (Pet. App. 62a.)[6] When the tenant carriers exercised the trackage rights authority granted by the Commission, the Brotherhood of Locomotive Engineers ("BLE") and the United Transportation Union ("UTU") protested to the Commission on behalf of the MP employees.[7] They argued that the tenants' use of their own crews amounted to a change in the collective bargaining agreements relating to the working conditions of MP employees; that such a change could be lawfully effected only pursuant to collective bargaining under the RLA; that the Commission has no power under the Interstate Commerce Act to authorize a transaction effecting such a change without resort to the procedures of the RLA; and that if the Commission did have such power it had not adequately explained the reasons for exercising it. (Pet. App. 57a-59a).[8]

The Commission rejected the unions' arguments. It reviewed the record and found that "the approved trackage rights operations" whereby the tenants use their own crews "are not inconsistent with the terms of any collective bargaining agreements * * *." (Pet. App. 61a.) It also concluded that, in any event, the tenants

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[6] "Pet. App." references are to the appendix to the petition of the Interstate Commerce Commission.

[7] Both the BLE and the UTU participated in the initial ICC proceeding, opposing the trackage rights transactions generally and requesting imposition of labor protections; but neither opposed the applications insofar as they would allow the tenants to use their own crews and neither objected on appeal to the approval of that aspect of the applications.

[8] In addition, the UTU threatened to strike the MP unless the MP refused to permit MKT crews to operate MKT trains on MP tracks. That threatened strike was enjoined by the District Court for the Eastern District of Missouri. *Missouri Pac. R.R.* v. *UTU*, 580 F. Supp. 1490 (E.D. Mo. 1984), *pdg. on appeal*, No. 84-1465 (8th Cir.).

were free to use their own crews because, even if that did amount to a change in the working conditions of MP employees, the RLA provisions did not apply for the reasons stated at length in *Brotherhood of Locomotive Engineers* v. *Chicago and North Western Ry.*, 314 F.2d 424, 430-31 (8th Cir. 1963). (Pet. App. 60a.)

Over a dissent by Judge MacKinnon, the court of appeals found the Commission's explanation inadequate. It vacated the Commission's orders on the asserted ground that the agency "did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act." (Pet. App. 19a; footnote omitted.)

ARGUMENT

We show below that the court of appeals was wrong in concluding that the Commission did not adequately explain the reasons for its conclusions; that the decision below creates a conflict among the circuits; and that certiorari is warranted in the interest of the orderly administration of justice in the federal courts and to resolve the uncertainty in the rail industry over the role, if any, of the Railway Labor Act in disputes arising from carrier efforts to implement transactions approved by the Commission as being in the public interest.

A. The Commission Adequately Explained Itself.

The Commission's reasoning in its October 19, 1983 decision "may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). It set out the issues for decision by stating the unions' claims: "that this Commission has no jurisdiction over crew assignment disputes and that they must be settled under the procedures of the Railway Labor Act" and that the Commission's approval of the trackage rights transaction could not "immunize [that]

transaction from the requirements of the RLA" or authorize the carriers to make "unilateral changes of collective bargaining agreements." (Pet. App. 57a.) The Commission then went on to reject those arguments, ruling that its approval of a transaction covered by § 11343—

> "exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA. *See Brotherhood of Loc. Eng.* v. *Chicago & North Western Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963)." (Pet. App. 59a.)

It also ruled (*id.* 60a):

> "To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction."

And then the Commission explained why (*id.*):

> "If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent. The discussion of this point in *Brotherhood of Loc. Eng.* [v. *Chicago and North Western Ry. Co.*], *supra*, at 430-1, is persuasive and we conclude that this reasoning is unaffected by the enactment of the 4-R Act."

The Commission's two citations to the Eighth Circuit's decision in the *Chicago and North Western* case (hereinafter "*BLE* v. *CNW*"), and its adoption of the reasoning there as its own, provide a fully adequate basis for its finding that the crew selection provisions of the approved

trackage rights agreements were exempt from the provisions of the RLA.[9] In that case the defendant carrier had, with the Commission's approval, purchased the properties and operating rights of another carrier, subject to employee protections imposed by the Commission. When the carrier sought to implement the transaction the unions objected, arguing that resort to the RLA major dispute procedures was required. But the court ruled that the RLA had been superseded by the Interstate Commerce Act for purposes of implementing the approved transaction. The court relied, among other things, on the legislative history of the Transportation Act of 1940, which was the source of congressionally imposed employee protective conditions and which amended the Interstate Commerce Act to provide for such protections. In passing that Act Congress rejected a proposed amendment—the "Harrington" amendment—that would have forbidden carriers from abolishing jobs or impairing existing employment rights as a result of a merger or other transaction needing the Commission's approval under § 11343. That amendment, the Eighth Circuit noted, " 'threatened to prevent all consolidations to which it related.' " *Id.* at 430 (quoting *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142, 151 (1950)). Its defeat fortified the conclusion that Congress intended the ICC-prescribed protective conditions rather than the RLA to govern the adjustments caused by merger implementations, for if the RLA were to govern it would allow the nullification of Commission-approved transactions:

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[9] See *Shepard* v. *NLRB*, 459 U.S. 344, 348-52 (1983), in which this Court upheld the Board's decision to forgo a requirement of reimbursement as a remedy for violation of § 8(e) of the National Labor Relations Act. The Board's reasoning on that issue was confined to a footnote and was "something less than a model of precise expository prose," but the Court was able to glean "the sense of the Board's explanation," in part by a reading of a decision that the Board had merely cited in the explanatory footnote. *Id.* 350.

> "[T]he ICC power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist. * * * Under the Railway Labor Act in a major dispute employees cannot be compelled to accept or arbitrate as to new working rules or conditions. * * * Thus under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and by refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations." *Id.* at 430-31.

The Eighth Circuit accordingly concluded that the Railway Labor Act was one of the laws from which carrier participants in ICC-approved transactions are exempt under § 11341(a) in implementing those transactions. *Id.* at 431-32.

The Eighth Circuit's reasoning, adopted below by the Commission as its own, has special—and we might add obvious—force in this case. The express rights of the trackage rights tenants to use their own crews was expressly recognized by the Commission to be a material term of each of the trackage rights applications it approved as being in the public interest. (Pet. App. 67a.) If the RLA were to apply to the crew selection process, the transaction approved by the Commission could be postponed while the "almost interminable" major dispute procedures of that Act were exhausted, or indeed frustrated altogether by threat of or resort to strike. The possibility of a strike in this case is not far-fetched: the MP's employees have already threatened and been enjoined from striking over this very matter. See note 8, *supra*.

The possibility that MP crews could resort to self help against the tenants has, if anything, even graver conse-

quences.[10] The very purpose of the grant of trackage rights was to protect and foster a competitive relationship between the tenants and the MP. It is inconceivable in the first instance that the tenants should have to bargain with and rely on MP employees in seeking to wrest new or protect existing traffic from the MP. And it would be astonishing if, as a result of a transaction approved by the Commission to maintain competition between the MP and the tenants, Congress intended to permit MP employees to interfere with and possibly shut down the tenants' entire operations. Moreover, if the MP employees demand, upon pain of strike, that MP ban tenant trains with tenant crews, and the tenant's employees demand, upon pain of strike, that the tenants not hire MP crews, a stalemate will result. Commerce will be interrupted and the Commission's approval of the trackage rights applications will be nullified. And finally, use of MP crews to operate the trains of the tenant lines obviously would require the approval of the MP, which would thus be empowered to frustrate the competition that the Commission intended to protect and preserve.

The short of the matter is that the Commission's reasoning was clear. It stated the unions' contentions and then rejected them because the tenants' ability to crew their own trains was material to the transaction and was thus exempt from RLA procedures under the rationale of *BLE* v. *CNW*. The decision may not be marked by organizational elegance, but "[t]he path which it followed can be discerned." *Colorado Interstate Gas Co.* v.

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[10] The RLA provides for bargaining only between one carrier "and the employees thereof," 45 U.S.C. § 152 First, not between one carrier and the employees of another. But if, as the decision below seems to suggest, the Act *could* be read to require the tenants to bargain with MP employees over the terms and conditions of employment of MP employees by the tenants, then presumably all of the Act's provisions would apply, including the MP's employees' right to resort to self help (such as picketing) against the tenants if their demands were not met.

FPC, 324 U.S. 581, 595 (1945). See also *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 532-33 (1946); *ICC* v. *Columbus & Greenville Railway*, 319 U.S. 551, 555 (1943).

B. The Decision Below Conflicts in Principle With the Decisions of Other Circuits.

The Eighth Circuit's decision in *BLE* v. *CNW* discussed above is not the only one to have held the RLA superseded by the Interstate Commerce Act with respect to disputes arising over implementation of ICC-approved transactions. Other decisions to the same effect include *Burlington Northern, Inc.* v. *American Railway Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (employee protection provisions ordered by ICC pursuant to merger are controlling in case of conflict with RLA procedures); *Bundy* v. *Penn Central Co.*, 455 F.2d 277, 279-80 (6th Cir. 1972) (minor dispute procedures of RLA are superseded by ICC-imposed order under § 5(2)(f) [now § 11347]); *IAM* v. *Northeast Airlines*, 400 F. Supp. 372, 373-74 (D. Mass. 1975), *aff'd*, 536 F.2d 975 (1st Cir. 1976) (RLA "is not applicable where the dispute arises out of a merger" because "Congress has provided a special mechanism for resolving the numerous problems atendant on such a merger"); *UTU* v. *Norfolk & Western Ry.*, 332 F. Supp. 1170, 1174 (N.D. Ohio 1971) ("plain language" of Interstate Commerce Act conferred "exclusive and plenary jurisdiction upon the ICC to approve mergers and relieve carriers from all other restraints of federal law, without carving a special exception with regard to the Railway Labor Act"). And the Sixth Circuit ruled in *Nemitz* v. *Norfolk & Western Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971), in language echoing the Eighth Circuit's quoted above:

> "The authority vested in the I.C.C. to effectuate proposed mergers would be rendered ineffective if au-

> thority to adjust work realignments through fair compensation did not exist. Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the Railway Labor Act to situations such as that presented here, like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore, should not be applied. *Brotherhood of Loc. Engineers* v. *Chicago & Northwestern Ry. Co., supra.*"

See also *Kent* v. *CAB*, 204 F.2d 263 (2d Cir. 1953), which held the procedures of the RLA inapplicable with respect to mergers approved by the CAB, under the protection provisions of the Civil Aeronautics Act, even though those provisions, which were generally similar to those in the Interstate Commerce Act, do not contain an express preemption provision of the kind found in 49 U.S.C. § 11341(a). See 49 U.S.C. App. § 1378 (1982 ed.).[11]

In the case at bar the court of appeals sought to distinguish *BLE* v. *CNW* on the ground that the Eighth Circuit in that case "recognized that immunity attached only to obstacles that would frustrate fruition of the" ICC-approved transaction. (Pet. App. 18a.) But as we have shown above, and as the Commission ruled below, the RLA major dispute procedures, if applicable to the crew selection process, *would* be an obstacle to fruition of

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[11] *Texas & New Orleans R.R.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), conflicts in certain respects with the authorities cited in the text. There the court ruled that the Norris-LaGuardia Act barred it from enjoining a threatened strike over the carrier's effort to implement an ICC-approved transaction. We believe that the court erred in holding that § 11347 [then § 5(2)(f)] of the Interstate Commerce Act is not part of the national pattern of labor legislation to which the Norris-LaGuardia Act must be accommodated. See *United States* v. *Lowden*, 308 U.S. 225, 236-38 (1939). In any event, even in that case the court acknowledged that union resorts to the RLA that were "contrary to the public interest" in the context of ICC-approved transactions would be unenforceable. 307 F.2d at 161-62.

the approved trackage rights transactions. Thus the court's distinction is one without a difference.

Moreover, the decision below misunderstands § 11341(a) and in that respect also is inconsistent with, if not squarely in conflict with, the Eighth Circuit. That section provides in pertinent part (emphasis added):

> "A carrier * * * participating in * * * a transaction approved by * * * the Commission under this subchapter may carry out the transaction * * * without the approval of a State authority. A carrier * * * participating in that approved * * * transaction *is exempt* from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * *."

As that plain language makes clear, the Commission is not called upon to do anything under § 11341(a). The types of transactions (including trackage rights transactions) that require Commission approval are set out in § 11343, and the criteria according to which the Commission is directed by Congress to grant or deny approval are set forth in § 11344. In particular, § 11344(c) provides that the Commission shall grant approval if "it finds the transaction is consistent with the public interest." Section 11341(a) then provides, without requiring further Commission interposition, that a carrier participant "is exempt from the antitrust laws and from all other law * * * as necessary to let that person carry out" the transaction that the Commission has approved. The Commission itself, in determining under § 11344 whether the public interest warrants approval of a proposed transaction, is not required to determine, or to make any findings, whether it would be "necessary" to override some particular law to effectuate the transaction if approved. *Schwabacher* v. *United States*, 334 U.S. 182 (1948).[12]

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[12] In *Schwabacher*, the Court explained that Commission approval of a proposed railroad merger "is dependent upon three, and upon

That is the point the Commission was making when, in answer to the contention of the unions that its initial orders approving the trackage rights applications did not expressly state that the carriers were exempt from the RLA, it said (Pet. App. 60a):

> "The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints."

And that is precisely what the Eighth Circuit ruled in rejecting a similar contention by the union in *BLE* v. *CNW* that the Commission had failed to make an express finding of exemption. The court held that the Commission's approval of a transaction, and its imposition of the required employee protections, "carried with it any exemption from the restraints of other laws as contemplated by § 5(11) [now § 11341(a)] to the extent necessary to carry out the merger." 314 F.2d at 432.

It is true that the Commission's approval of a transaction immunizes the carrier participants from the RLA only to the extent necessary to implement the transaction. Thus it may be that, subsequent to the Commission's order of approval, a union will argue that the carriers are seeking more immunity from the major dispute procedures of the RLA than is necessary to implement the approved transaction. In such a case the issue for decision will be whether application of the RLA

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only three considerations," those then set forth in the predecessor to § 11344. Following Commission approval, the "approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of 'restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved * * *.'" 334 U.S. at 194. *BLE* v. *CNW* and other such decisions by the lower courts in cases involving the RLA are consistent with that decision; the decision below is not.

would frustrate or impede implementation: if so, then the carriers are exempt from the RLA under § 11341(a). The issue will not turn on whether the Commission, in its order of approval, made any findings of the need for an exemption under § 11341(a) from some other statute for, as shown above, that section requires no action whatever by the Commission in passing on an application subject to § 11343. Rather, the function of the Commission under § 11344 is to determine whether a grant of the application is in the public interest and otherwise comports with the standards specified therein.[13]

The court of appeals' misunderstanding of § 11341(a) led it to the erroneous conclusion that the Commission "rejected the notion that it had to provide some basis for concluding that waiver of the Railway Labor Act was necessary" to the transaction it had approved. (Pet. App. 10a.) As we have shown, the Commission correctly construed § 11341(a) as not requiring findings with respect to exemption in the initial order of approval. When the issue of exemption subsequently arose, the Commission adequately explained why the crew selection process necessarily was exempt from the RLA. On both counts the Commission's decision is squarely in keeping with the statute and with *BLE* v. *CNW* (and the other decisions cited above), and on both counts the decision of the court of appeals is in conflict with the principle of those decisions.

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[13] This is not to say that an opponent of an application could not contend that the grant of the application would not be in the public interest under the circumstances of the particular case if the result would be to override rights under another statute such as the RLA, and the Commission might well have a duty to consider such a contention if made, but no such contention was made in the initial agency proceeding regarding the terms of the trackage right applications relative to crew selection.

C. Certiorari Is Warranted Now So That the Court May Resolve the Relationship Between the Two Statutes.

The role of the RLA in disputes arising out of carrier efforts to implement ICC-approved rail transactions presents the most pressing labor issue in the rail industry today. Litigation over this issue has erupted all over the country and as a consequence many transactions, already determined by the Commission to be in the public interest according to the criteria established by Congress in § 11344, have been or may be impeded. Thus, in *IAM* v. *Boston and Maine Corporation*, No. 84-3703-T (D. Mass. filed Nov. 15, 1984), the plaintiff union, urging the applicability of the RLA and relying on the decision of the court of appeals in the case at bar, has sought to enjoin the Boston and Maine, the Delaware and Hudson, and the Maine Central—three carriers whose common control by Guilford Transportation Industries was approved by the Commission under § 11343 [14]—from seeking to arbitrate a dispute over implementation pursuant to the mandatory arbitration provisions prescribed by the Commission. Other litigation also turning on the relation between the two statutes includes *Missouri Pac. R.R.* v. *UTU*, 580 F. Supp. 1490 (E.D. Mo. 1984), *pdg. on appeal*, No. 84-1465 (8th Cir.) (discussed at note 8, *supra*); *RLEA* v. *Butte, Anaconda and Pac. R.R.*, No. CV-85-73-BU (D. Mont.), *pdg. on appeal*, No. 85-3875 (9th Cir.) (preliminary injunction granted plaintiff claiming applicability of RLA to ICC-approved sale and lease); *RLEA* v. *Staten Island Railroad Corp.*, No. CV-85-1532 (E.D.N.Y., decided May 21, 1985), *pdg. on appeal*, No. 85-7483 (2d Cir.) (dismissal of suit to compel carrier to bargain under RLA over ICC-approved

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[14] See *Guilford Transp. Industries, Inc.—Control—Boston and Maine Corp.*, 366 I.C.C. 294 (1982), *aff'd in relevant part, Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295 (D.C. Cir. 1983); *Guilford Transp. Industries, Inc.—Control—Delaware and Hudson Ry.*, 366 I.C.C. 396 (1982), *aff'd in relevant part, Central Vermont Ry.* v. *ICC*, 711 F.2d 331 (D.C. Cir. 1983).

sale transaction); *UTU* v. *Maine Central R.R.*, No. 85-0184-P (D. Me.) (suit to compel carrier to bargain under RLA over ICC-approved lease transaction); *Brotherhood of Locomotive Engineers* v. *Boston and Maine Corp.*, No. 85-2882-K (D. Mass.), *pdg. on appeal*, No. 85-1852 (1st Cir.) (dismissal of suit to compel carrier to bargain under RLA over ICC-approved lease transaction); *UTU* v. *Boston and Maine Corp.*, No. 85-3475-K (D. Mass.) (suit to compel carrier to bargain over ICC-approved lease transaction); *UTU* v. *Norfolk and Western Ry. Co.*, No. 85-3410 (D.D.C.) (suit to enjoin arbitrated implementing agreement and to compel the carrier to bargain under the RLA over ICC-authorized lease transaction, dismissed Nov. 27, 1985).

The pendency of all of these suits does not fully reflect the confusion and uncertainty in the rail industry over implementation of ICC-approved transactions, for on many rail properties unions have demanded bargaining under the RLA over union proposals that, if agreed to by the carrier, would block or impede implementation of approved transactions. Not all of those demands have yet spawned lawsuits, but the carriers generally view those demands as nonmandatory subjects of bargaining and litigation on that score is probable if not inevitable. In the meantime, whether in litigation or not, the carriers and the unions are at loggerheads. Neither side is served by this uncertainty—as evidenced by the unions' cross-petitions for certiorari in this case—and while it persists the implementation of approved transactions is being or may be postponed.

The fact that the court of appeals in the instant case has ordered a remand to the Commission should not be a deterrent to certiorari. On remand the Commission can only repeat, for the reasons stated by the Eighth Circuit in *BLE* v. *CNW*, that the RLA is preempted with respect to the crew selection provisions of the approved trackage rights transactions. That will not ameliorate

the harm caused by the ruling of the court below that the RLA can be preempted only to the extent found necessary by the Commission, for the unions will continue to brandish that decision (as they are now) in support of their contention that carriers must follow RLA procedures (and possibly face a strike) in seeking to implement transactions that the Commission has already approved in decisions that do not make any express findings under § 11341(a) concerning the RLA.

In sum, the decision below, the inconsistent results reached in the other litigation that is already pending, and the outstanding union bargaining demands mentioned above, are causing grave uncertainty and labor relations disputes throughout the rail industry. Management and labor are apparently in accord on one point, however, which is that the Court's guidance is needed now.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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